REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO 166 OF 2016

NYANJE MWERO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(*An appeal against the original conviction and sentence of Hon D.N. Ogoti CM,**

delivered on 24th June 2016 in Sexual Offence Case No. 36 of 2016

in the Chief Magistrate's Court at Mombasa)

JUDGMENT

The Appeal

1. The Appellant was charged in the trial Court with the offence of defilement , contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The particulars of the offence were that on the 27th March 2016 at [Particulars Withheld] area in Likoni sub–county within Mombasa County, he intentionally and unlawfully caused his penis to penetrate the vagina of D N, a child aged 15 years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

3. The Appellant pleaded not guilty to the charge in the trial court on 8th April 2016, and he was tried, convicted of the offence of defilement, and sentenced to 20 years imprisonment for the offence .

4. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in his Petition of Appeal filed in Court on 28th December 2016, and Amended Grounds of Appeal that he availed to the Court are as follows:

a. That the learned trial magistrate erred in law and fact by convicting and sentencing him to 20 years imprisonment without considering that the same was harsh and excessive.

b. That the learned trial magistrate erred in law and fact by convicting and sentencing him without considering that the charge of defilement was not proved beyond reasonable doubt since the medical evidence presented was not satisfactory.

c. That the learned trial magistrate erred in law and fact in convicting the Appellant by not considering that the public members who arrested him were never called to testify contrary to section 150 of the Criminal Procedure Code.

d. That the learned trial magistrate erred in law and fact by not considering his reasonable defence.

5. The appeal proceeded for hearing on 28th August 2018, and the Appellant submitted that he would wholly rely on his written submissions dated 28th August 2018 that he availed to the Court. Ms Mutua, the learned Prosecution counsel, made oral submissions at the hearing on behalf of the Respondent.

6. The Appellant in his submissions stated that he was convicted and sentenced under section 8 (3) of the Sexual Offences Act which

provides for a minimum sentence of 20 years imprisonment, however that there was contradictory evidence as to the age of the complainant with PW1 testifying that she was 15 years old, while PW4 stated and her birth certificate showed that she was 16 years old. Therefore, that he ought to have been sentenced under section 8(1) as read with 8(4) of the Sexual Offences Act, and his sentence reduced to 15years imprisonment.

7. The Appellant further submitted that the medical evidence adduced in the trial Court did not warrant his conviction as no medical doctor from the medical centre where the complainant was first taken for treatment testified, and PW4 who was a police officer could not produce the complainant's treatment notes from the said medical centre as he was not the maker of the same, and was not qualified to answer any questions on the treatment notes. Reliance was in this regard placed on section 71 of the Evidence Act.

8. In addition, that the evidence of the medical doctor did not support a finding of defilement as the P3 was filled six months after the alleged defilement; the doctor who produced the said P3 form was not the maker thereof, and as there was no other medical evidence adduced other than the complainant having a broken hymen and an old scar. Lastly that the persons who arrested the Appellant were not called to testify to clear the doubt of his arrest.

9. Ms Mutua for the Respondent submitted that section 8(1) and (3) of the Sexual Offences Act provides for a mandatory penalty of 20 years imprisonment , and that the sentence meted out on the Appellant was lawful. Further, that PW3 who was a medical doctor testified on the injuries inflicted upon the complainant, and produced a P3 form and PRC form as exhibits which established that the complainant had been defiled.

10. On the third ground of appeal, Ms. Mutua submitted that the persons who arrested the Appellant would not have added any value to the Prosecution's case, as the necessary ingredients of the offence of defilement as regards penetration, the age of the complainant and identification of the Appellant were proved by the witnesses called to testify. Lastly, that there was no defence that could be considered by the trial Court, as the Appellant opted to keep silent when asked to defend himself.

11. Having heard the arguments made by the Appellant and Respondent, my duty as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

12. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called four witnesses. PW1 was D N, who was the complainant and who testified after a *voire dire* examination, while the complainant's mother, V M N testified as PW2. Both PW1 and PW2 testified as to the events of 27th March 2016, when the alleged offence was committed, and the subsequent actions that were taken.

13. Dr. Jilian Njambi Nduri, a medical officer at Coast General Hospital Mariakani District Hospital was PW3 and she testified on the results of the medical examination of the complainant, and produced a PRC form dated 29th March 2016 as the Prosecutions Exhibit 3, and a P3 form dated 5th September 2016 as the Prosecutions' Exhibit 4.

14. The last prosecution witness (PW4) was Sergeant Florence Oyugi of Likoni Police Station and the investigating officer, and she testified as to the report she received of the defilement of the complainant on 27th March 2016 and the arrest of the Appellant by members of the public on 7th April 2016, whereupon he was a charged with the offence. PW4 also produced the complainant's birth certificate as the Prosecution's Exhibit 1.

15. The trial court found that the Appellant had a case to answer and complied with section 211 of the Criminal Procedure Code in this respect. When called to give his defence, the Appellant opted to keep quiet and wait for the Court to decide.

The Determination

16. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I find that there are only two issues for determination raised in this appeal, given that the Appellant did not give any evidence in his defence. The issues are whether the Appellant was convicted for the offence of defilement on the basis of sufficient and satisfactory evidence and if so, whether the sentence imposed on his was unlawful and/or excessive.

17. On the first issue, the Appellant was charged with the offence of defilement, which is provided for in section 8 of the Sexual Offences Act as follows:

> "**(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**
>
> **(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**
>
> **(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."**

18. The ingredients of the offence were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as

follows**:**

> **"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

19. The Court of Appeal in the case of **Maripett Loonkomok v Republic [2016] eKLR** further stated as follows on the issue of proof of age in sexual offences:

> **"The question of age, as we have stated earlier is a question of law under the Sexual Offences Act, at least to prove that the victim was a child at the time of defilement and also for purposes of sentence. However the question whether the complainant was 9, 10 or 13 is a question of fact with which we can only interfere if it is demonstrated that the High Court made conclusions of fact on no evidence at all or that the conclusions were perverse in nature. It follows that to constitute a question of law the wrong finding should stem out of a complete misreading of evidence or it should be based only on conjectures and surmises."**

20. The said Court in ***Moses Nato Raphael vs Republic*** **[2015] eKLR** also clarified the difference between proof of age for purposes of establishing the offence of defilement and for purposes of sentencing as follows:

> **"On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in *Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010*, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability."**

21. Therefore, a Court has discretion to find what the apparent age of a victim is from the documents presented to it and from the victim's testimony, when the only inconsistency is as regards the various categories of ages provided by section 8 of the Sexual Offences Act for purposes of sentencing. This was also the position taken by the Court of Appeal in **Stephen Nguli Mulili vs Republic, Criminal Appeal No 90 of 2013**.

22. In the present appeal, PW4 produced as the Prosecution's Exhibit 5 a birth certificate that showed that the complainant's date of birth was 27th October 2000, which was confirmed by PW1 and PW2 in their testimony. Therefore at the time of the alleged commission of the offence on 27th March 2016, the complainant had attained the age of 15 ½ years . To this extent as the complainant had not attained the age over 16 years, the Appellant was properly charged and sentenced under section 8(1) as read together with 8(4) of the Sexual Offences Act, which provides for a minimum sentence of 20 years imprisonment.

23. Guidance of computation of time in respect of years is in this respect given by the Constitution in Article 259(5), which provides that in calculating time between two events, if the time is expressed as years, the period of time ends at the beginning of the date of the relevant year that corresponds to the date on which the period began. Therefore 16 years from 27th October 2000 when the complainant was born could only have started on 28th October 2016, and on 27th March 2016 the complainant was still 15 years old.

24. On the Appellant's identification PW1 and PW2 both testified that they did know the Appellant by name, as he was their neighbor, and saw and identified him on the day of the alleged offence. PW1 testified that the Appellant called her to his house and she went there at 8.00pm on the material day. PW2 testified that after waiting for PW1 to come home on that day, she waited at the corridor of her house, whereupon at 2.00pm she saw the Appellant come out of his room, whereupon he opened the door and let PW1 out of the room.

25. In addition, both PW1 and PW2 testified that they did know the Appellant by name, as he was their neighbor, and saw and identified him on the day of the alleged offence. PW1 testified that the Appellant called her to his house and she went there at 8.00pm on the material day. PW2 testified that after waiting for PW1 to come home on that day, she waited at the corridor of her house, whereupon at 2.00pm she saw the Appellant come out of his room, whereupon he opened the door and let PW1 out of the room.

26. Therefore, this was not merely a case of identification but also of recognition of the Appellant by the complainant and PW2. It was in this regard held by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

27. The above findings notwithstanding, it is nevertheless my view that the evidence adduced by the prosecution was insufficient to prove the ingredient of penetration. In this respect, PW1's evidence was as follows:

> **"I know the Accused by name. He is called Mwero Nyanje. On 27th March 2016, it was about 8.00pm he called me into our house. I had got to put out the charcoal. I went to his room. He was our neighbor. I went and we made love. We had sex. We removed our clothes. We finished as about 2 pm, I put on my clothes and went back home. We did it on a mart"**

28. Section 2 of the Sexual Offences Act provides that penetration entails the partial or complete insertion of the genital organs of a person into the genital organs of another person. In the present appeal, no evidence was given as to any penetration by the Appellant of his genital organ in any part of the complainant's genital organ, which is key to a determination as to whether defilement occurred or not. The complainant's testimony was that she made love and had sex with the Appellant.

29. In this regard, **Black's Law Dictionary , Ninth Edition** at pages 1498-1499 defines sex as the structures and functions that distinguish a male from a female; sexual intercourse; or sexual relations. In addition, sexual relations is defined either to be sexual intercourse or physical sexual activity that does not necessarily culminate in sexual intercourse. Therefore, it is not always the case that sex is synonymous with penetration, hence the definition of penetration that is set by section 2 of the Sexual Offences Act, which is required to be proved beyond reasonable doubt.

30. This Court in **Julius Kioko Kivuva v Republic [2015] eKLR** held as follows as regards the specificity required in the proof of penetration:

> **"Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal".**

31. PW1's testimony was not specific as to the act of penetration; and her evidence of making love or having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of making love and having that sex.

32. Lastly, the evidence by PW3 that PW1's hymen was broken with an old scar at the time of her medical examination on 5th September 2016was corroboration of penetration, however it did not identify the person responsible and was therefore not corroboration as to penetration by the Appellant. I therefore find that there were gaps in the evidence adduced by the prosecution and it was not sufficient to establish the offence of defilement as against the Appellant beyond reasonable doubt .

33. I accordingly quash the conviction of the Appellant for the offence of defilement, contrary to section 8 (1) and (3) of the Sexual Offences Act. I also set aside the sentence of twenty years imprisonment imposed upon the Appellant for this conviction, and order that he is set at liberty forthwith unless otherwise lawfully held.

34. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 5th DAY OF SEPTEMBER 2018.

P. NYAMWEYA

JUDGE